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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SETH HOFFBERG, Plaintiff and Appellant, v. FLINTRIDGE BUILDERS, INC. et al., Defendants and Respondents.	B212369 (Los Angeles County Super. Ct. No. EC046438)

APPEAL from an order of the Superior Court of Los Angeles County, Charles W. Stoll, Judge. Affirmed.

Shenian Law Firm and Datev Shenian for Plaintiff and Appellant.

Murtaugh Meyer Nelson & Treglia and Jillisa L. O'Brien for Defendants and Respondents.

INTRODUCTION

Plaintiff Seth Hoffberg appeals from an order vacating a default and default judgment entered against defendants Flintridge Builders, Inc. (Flintridge), a California Corporation, and its principal, Stephen M. Robertson (Robertson), sometimes collectively referred to as defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying action arises from the remodeling of plaintiff's home by defendants. Plaintiff alleged that defendants provided substandard materials, contrary to their representations, hired inexperienced subcontractors, the workmanship was not satisfactory and they failed to complete the project in a timely fashion. Plaintiff filed a complaint on February 14, 2008, alleging fraud, negligent misrepresentation, rescission, negligence, conversion, breach of oral contract and unfair competition. Defendants became aware of the lawsuit when the summons and complaint was found in defendants' mailbox on February 25, 2008. A default was entered on April 15, 2008. Plaintiff proceeded to a default prove-up on June 23, 2008, and a default judgment was entered on July 30, 2008 for $215,967.07, plus interest and costs. On August 8, 2008, defendants filed a motion to set aside the default and default judgment. The motion to set aside was granted on September 19, 2008, subject to payment to plaintiff the sum of $2,000 within 15 days.

Robertson's declaration in support of the motion to set aside stated that on March 11, 2008, he faxed a copy of the summons and complaint to his insurance agent, Art Gross (Gross), of Tri-County Insurance. He believed that on the same day, copies were faxed to his commercial general liability carrier, Navigators Insurance Company (Navigators). On March 14, 2008, he received correspondence from Bill Ortolano (Ortolano) of Navigators requesting information. He believed that Navigators would do what was necessary to protect his interests.

Robertson was surprised on April 8, 2008 to receive a request for entry of default. On the same day, he faxed a copy of the paperwork to Gross and believed that Gross immediately faxed a copy to Navigators. On the same date, he talked to Gross and was informed that the claim had been "assigned" and the complaint had been "answered." He assumed that Navigators had retained a law firm to handle the claim.

On May 31, 2008, Robertson sent an email to Ortolano advising him that he was working on getting the information previously requested, but he was having difficulty since his computer had been stolen. He did not receive a response to his email. On June 30, 2008, he checked the status of the case on the court's website and saw that a case management conference had been set for July 3, 2008. On the same day, he called Gross and tried to contact Navigators, but their telephone lines were not working. He exchanged emails with Ortolano and learned that an answer had not been filed. He received an email from Ortolano indicating that an attorney had been retained and the law firm would attend the July 3 case management conference.

Attorney Jillisa L. O'Brien, in her declaration, states that she was requested to represent defendants' interests on June 30, 2008. On July 3, she attended the case management conference and was informed that a prove-up hearing had occurred, but a judgment had not been entered. Upon being retained, she telephoned plaintiff's counsel and told him that she would be bringing a motion to set aside the default. Plaintiff's counsel indicated that when he received the moving papers, he would consider stipulating to setting aside the default and judgment.

Attorney O'Brien indicated that she believed her client had a meritorious defense to the lawsuit. The earliest hearing date that was available was September 5, 2008, because the trial court was not available the entire month of August.

The declaration submitted by plaintiff's counsel, Attorney Datev "Dave" Shenian, in opposition to the motion to vacate default and default judgment, indicates that prior to filing the lawsuit, he sent three letters to defendants and never received a response. After defendants were served with the summons and complaint on or about February 20, 2008, he did not receive any communications from defendants until sometime on or after

June 30, 2008, when counsel for defendants called regarding the default. He indicated that he was disinclined to agree to set aside the default. In addition to attorney's fees incurred in the litigation, he believed that there would be prejudice by setting aside the default and allowing defendants to obtain transcripts of the prove-up hearing to aid them in their defense.

DISCUSSION

On appeal from an order granting or denying a motion to vacate a default and default judgment, the question is whether the trial court abused its discretion in ruling on the motion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Absent a clear showing of abuse of discretion, the order will not be disturbed. (*Ibid*.)

Code of Civil Procedure section 473, subdivision (b) (section 473), provides that "[t]he court may, upon any terms as may be just, relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." A motion for relief from judgment under this section lies within the sound discretion of the trial court. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) This discretion "must be '"exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citations.]" (*Ibid*.) However, before relief may be granted, the party seeking relief must demonstrate that the judgment was taken against him or her through mistake, inadvertence, surprise or excusable neglect. (See *id*. at p. 234.)

The provisions of section 473 are liberally construed in favor of the determination of actions on their merits. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256.)

Defendants' Neglect

Defendants filed their motion for relief less than four months after the default was entered and less than two weeks after the default judgment was obtained. Counsel for

defendants was finally retained on June 30 and appeared on July 3 for a case management conference.

While there is no question that defendants were served with the summons and complaint, and the summons clearly indicated that a party has 30 calendar days to file a written response, we find that their failure to timely respond was a result of mistake, inadvertence and excusable neglect. Defendants promptly notified their insurance agent of the lawsuit. Navigators acknowledged receipt of the claim and requested information from defendants. This led them reasonably to believe that their interests were being protected, i.e., that Navigators had retained counsel to represent them and an answer had been filed on their behalf. Defendants therefore were surprised to learn from their counsel on July 15, 2008 that judgment had been entered against them and a motion would be necessary to request that the judgment be set aside.

Insurer's Neglect

Plaintiff contends that even if defendants' neglect was excusable, the conduct of the insurer did not constitute excusable neglect and the default and default judgment should not have been set aside. We disagree.

Even assuming that the conduct of the insurer did not constitute excusable neglect, we find that the trial court acted in its discretion in setting aside the defaults. Plaintiff relies primarily on the cases of *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139 and *Don v. Cruz* (1982) 131 Cal.App.3d 695. In *Scognamillo*, the defendants had notified the insurer of the action and the insurer had repeatedly assured defendants that everything would be handled. The insurer had failed to file an answer to the complaint, apparently because the copy of the complaint and summons provided to the insurer by defendants had been misfiled. (*Scognamillo, supra*, at pp. 1143-1144.) The court, relying on *Don*, held that in order to obtain relief from default, an insured who is relying on its insurer to provide a defense must demonstrate excusable neglect on the part of the insurer. (*Id*. at pp. 1149-1150.)

Even adopting that premise, the facts in the instant case are distinguishable. In *Scognamillo*, plaintiff's counsel had at least three conversations with defendants before filing the request for default. In each conversation, he advised defendants that no action had been taken to respond to the lawsuit. Defendants spoke to their insurance broker, who assured them the insurer was handling the matter. (*Scognamillo v. Herrick*, *supra*, 106 Cal.App.4th at p. 1144.) In the instant case, after defendants were served with the summons and complaint, they were not advised that an answer had not been filed on their behalf. Consequently, they did not let their insurer know that there was a problem and the answer had not been filed. This supports a finding the insurer's neglect was not inexcusable here, as it was in *Scognamillo*.

The case of *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816 is a compelling argument supporting the trial court's exercise of discretion to set aside the defaults. *Rogalski* was a wrongful termination action against Rogalski's former employers. The defendants were served and contacted their insurance broker, who forwarded the summons and complaint to their insurer. The insurer failed to respond to the complaint in a timely fashion. The plaintiff's counsel wrote to the defendants that he would enter defaults if responses were not filed within five days. The insurer contacted the plaintiff's counsel, indicating that it was still investigating coverage and asked for more time to file a response. The request was denied and the plaintiff indicated when a default would be obtained if no response was filed. The insurer told the defendants that it was denying coverage and a default was entered. The defendants immediately obtained counsel but were unsuccessful in having the default set aside. (*Id*. at pp. 818-819.)

The court noted that, in the context of an attorney's negligence, "courts have long afforded relief to litigants whose attorney's neglect amounts to 'positive misconduct' toward the client." (*Rogalski v. Nabers Cadillac*, *supra*, 11 Cal.App.4th at p. 821.) In the case before it, the insurer led defendants to believe it was representing their interests then abruptly abandoned them without taking any steps to protect their rights. (*Ibid*.)

Similarly here, the insurer repeatedly indicated to Robertson that his interests were being represented. He was told that the complaint had been answered. It was not until

after the default was entered, however, that Robertson learned the truth—that nothing had been done to protect defendants' interests in court.

The case of *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681 is factually similar to the instant matter and also supports the trial court's exercise of discretion in setting aside the defaults. In *Fasuyi*, a manufacturing defendant in a products liability case forwarded the process documents, including the complaint, to the insurance broker, and the insurance broker forwarded the documents to the insurer. The insurer failed to retain counsel or appear on the manufacturer's behalf. The plaintiff's counsel, without any communication with defendant, quickly obtained a default and default judgment. (*Id.* at p. 685.)

The court held that the trial court's refusal to grant relief from default was an abuse of discretion. The court observed that "'"[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary."'" (*Fasuyi v. Permatex, Inc.*, *supra*, 167 Cal.App.4th at p. 696.) "'Where a default is entered because defendant has relied upon a codefendant or other interested party to defend, the question is whether the defendant was reasonably justified under the circumstances in his reliance or whether his neglect to attend to the matter was inexcusable. [Citations.] This rule has been held applicable where an insured relied upon his insurer to defend. [Citation.]'" (*Id.* at p. 697.)

In the case before it the defendant "forward[ed] the summons and complaint to its insurance broker for appropriate handling. The broker also did what any good broker should, and immediately forwarded the complaint on to the appropriate insurers, received back the requested confirmation, and believed that the matter would be tended to. Sadly, it was not." (*Fasuyi v. Permatex, Inc.*, *supra*, 167 Cal.App.4th at pp. 700-701, fn. omitted.) Such is the case here.

Moreover, plaintiff made no showing of prejudice if the request for relief from default were granted. The bare claim that defendants would be able to obtain a tactical advantage by looking at the court file and transcript of the default prove-up hearing does

not establish prejudice. Moreover, this allegation of prejudice is weakened by the representation by defendants' counsel in the reply to plaintiff's opposition to defendants' motion to set aside default that defendants would agree not to order the court reporter's transcripts for the default prove-up.

There was little delay occasioned by the relief from default, and plaintiff failed to demonstrate any prejudice from what little delay there was. Additionally, the court ordered defendants to make a payment to plaintiff to cover his costs. We thus find no abuse of discretion in the trial court's grant of relief from the default and default judgment.

Evidentiary Objections

Plaintiff contends that the trial court committed prejudicial error in overruling all of his evidentiary objections. We disagree.

Prior to the hearing on the motion to set aside, plaintiff filed "Plaintiff's Evidentiary Objections to Defendants' Motion to Vacate Default and Default Judgment." At the conclusion of the hearing on the motion, counsel for plaintiff requested a written ruling on the evidentiary objections. The trial court did not orally rule on the objections at the hearing. On September 26, 2008, he did execute defendants' "Order Re: Defendants' Motion to Vacate Default and Default Judgment." However, the order is unclear as to the trial court's ruling on the evidentiary objections.

On October 22, 2008, plaintiff's counsel applied, ex parte, for an order clarifying the order on motion to vacate default and default judgment entered by the court. On October 23, the notice of ruling after the ex parte hearing confirmed that the trial court overruled all of plaintiff's objections to defendants' evidence.

Plaintiff asserts that "[b]y overruling the Evidentiary Objections in a blanket fashion, the Trial Court committed error of law." Plaintiff cites no authority to support this proposition. Neither does he address the objections individually and explain why the trial court erred in overruling them.

It is well established that in addressing an appeal, the appellate court begins with the presumption that the trial court's ruling is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) The appellant has the burden of showing reversible error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) It also requires citation to relevant authority and argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) It is not the responsibility of this court to comb the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; see also *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301.) The failure to meet this burden forfeits the issues on appeal. (*Mansell, supra,* at pp. 545-546.)

Plaintiff has utterly failed to meet his burden of showing that the trial court erred in overruling his evidentiary objections. Consequently, we deem his claim forfeited.

DISPOSITION

The order is affirmed. The parties are to pay their own costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J. ZELON, J.